



## Testimony

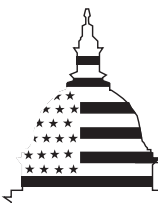
Before the Committee on Indian Affairs, U.S. Senate

For Release on Delivery  
Expected at 10:00 a.m.,  
Tuesday, July 31, 2001

# FEDERAL TORT CLAIMS ACT

## Coverage and Claims for Tribal Self-Determination Contracts at the Indian Health Service

Statement of Barry T. Hill, Director,  
Natural Resources and Environment



G A O

Accountability \* Integrity \* Reliability

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Mr. Chairman and Members of the Committee:

The Indian Self-Determination and Education Assistance Act was passed in 1975 to encourage tribes to participate in and manage programs that for years had been administered on their behalf by the Department of Health and Human Services and the Department of the Interior. The act authorizes tribes to take over the administration of such programs through contractual arrangements with the agencies that previously administered them: Health and Human Services' Indian Health Service and Interior's Bureau of Indian Affairs.<sup>1</sup> For the Indian Health Service, the programs include mental health, dental care, hospitals, and clinics, and for the Bureau of Indian Affairs, the programs that can be contracted by tribes include law enforcement, education, and social services.

Under the first 15 years of the Self-Determination Act, tribal contractors generally assumed liability for accidents or torts (civil wrongdoings) caused by their employees. However, in 1990, the federal government permanently assumed this liability when the Congress extended Federal Tort Claims Act (FTCA) coverage to tribal contractors under the Self-Determination Act. Originally enacted in 1946, FTCA established a process by which individuals injured by federal employees could seek compensation from the federal government. As a result of extending this coverage to tribal contractors, individuals injured by tribal employees may, under certain circumstances, seek compensation from the federal government. For example, if a patient receives negligent care at a tribal health facility, administered under a self-determination contract, the injured party may be able to seek compensation from the federal government for their personal injuries.

To gain a better understanding of how this coverage works, you asked us to review and report on various aspects of it. We provided this Committee with our report on July 5, 2000.<sup>2</sup> We testified before this Committee last year on the combined FTCA claims history for tribal self-determination contracts at the Indian Health Service and the Bureau of Indian Affairs and

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<sup>1</sup>Throughout this statement, the term "tribes" will refer both to tribes and tribal organizations eligible to contract programs under the Indian Self-Determination and Education Assistance Act. Also, the term "contracts" will refer to contracts, grants, self-governance agreements, cooperative agreements, or annual funding agreements entered into pursuant to the Indian Self-Determination and Education Assistance Act, as amended.

<sup>2</sup>*Federal Tort Claims Act: Issues Affecting Coverage for Tribal Self-Determination Contracts* (GAO/RCED-00-169, July 5, 2000).

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FTCA legal issues that are unique to tribal contractors.<sup>3</sup> Our testimony today will focus solely on the Indian Health Service. Specifically, our testimony will (1) describe the process for implementing FTCA coverage for tribal self-determination contracts and (2) present the FTCA claims history for tribal self-determination contracts at the Indian Health Service for fiscal years 1997 through 1999. The status of the FTCA claims presented in this testimony has been updated since our July 2000 report and is current as of July 15, 2001.

In summary:

- Federal regulations implementing FTCA prescribe the process that federal agencies must follow in resolving claims arising from the negligent or wrongful acts of federal employees. With the extension of FTCA coverage to tribal contractors, tribal employees or volunteers under a self-determination contract are considered federal employees for the purpose of FTCA coverage. According to FTCA regulations, claims are subject first to an administrative review and determination by the federal agency whose actions gave rise to the claim. At the administrative level, the Department of Health and Human Services handles these claims for the Indian Health Service. If a claim is not resolved administratively, a lawsuit may be filed in federal court, where the Department of Justice would defend it. Administrative and legal settlements may be paid from agency funds, the U.S. Treasury, or tribes' private liability insurance if duplicative coverage exists.
- Data on FTCA claims involving tribal contractors are not readily available because the Department of Health and Human Services is not required to track these claims separately from FTCA claims involving federal employees. However, in response to our request for claims data, the department identified 114 claims, filed from fiscal years 1997 through 1999, that arose from programs contracted from the Indian Health Service. Total damages claimed were \$487 million. Patient care activities and vehicle accidents of a few tribes gave rise to most of the claims. Although about half of the claims remain open, 58 (involving \$230 million in claimed damages) have been brought to closure at a cost of less than \$700,000. Of the claims brought to closure, 40 resulted in settlement payments and 18 were denied.

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<sup>3</sup>*Federal Tort Claims Act: Claims History and Issues Affecting Coverage for Tribal Self-Determination Contracts* (GAO/T-RCED-00-234, July 12, 2000).

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## Background

The Federal Tort Claims Act was enacted in 1946 and provides a limited waiver of the federal government's sovereign immunity. It specifies the instances in which individuals injured by the wrongful or negligent acts or omissions of federal employees can seek restitution and receive compensation from the federal government through an administrative process and, ultimately, through the federal courts. The Department of Justice handles lawsuits arising from FTCA claims.

The Indian Self-Determination and Education Assistance Act of 1975 allowed Indian tribes to contract for administration of certain federal Indian programs. As originally enacted, tribal contractors assumed liability for torts caused by tribal employees performing official duties. The act authorized the Secretaries of Health and Human Services and the Interior to require that tribal contractors obtain private liability insurance. People injured by the actions of tribal contractors could file claims against tribal employees or their tribes.

By the late 1980s, the Congress recognized that some tribes were using program funds to purchase private liability insurance, which reduced the funds available to provide direct program services. Thus, the Congress amended the act in 1988 and required that beginning in 1990 the Secretaries of Health and Human Services and the Interior obtain or provide liability insurance or equivalent coverage for the tribes. Also in the late 1980s, the Congress began to enact statutes extending FTCA coverage to tribal self-determination contracts. In 1990, this coverage was extended permanently, thus giving injured parties the right to file tort claims against and recover monetary damages from the federal government for injuries or losses resulting from the negligent actions of tribal employees.

Federal Indian programs that tribes can contract under the Self-Determination Act fall under the jurisdiction of the departments of Health and Human Services and the Interior. Within these departments, the primary agencies responsible for administering Indian programs are the Indian Health Service and the Bureau of Indian Affairs, which have a combined annual appropriation exceeding \$4 billion. Indian tribes administer about one-half of these programs, or about \$2 billion annually. As of March 2000, there were 556 federally recognized tribes. Agency officials estimate that nearly all of the federally recognized tribes administer at least one contract from the Indian Health Service or Bureau of Indian Affairs, either directly or as a member of a tribal consortium.

The Indian Health Service and the Bureau of Indian Affairs programs administered by a tribe under the Self-Determination Act may represent

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only a portion of that tribe's total activities. The other programs tribes operate outside of the Self-Determination Act may include other federal programs, such as federal housing assistance for Native Americans under the Department of Housing and Urban Development, early childhood educational and care programs under the departments of Education and of Health and Human Services, and tribal enterprises, such as gaming operations and smokeshops or convenience stores. These programs have generally not been extended FTCA coverage. The tribes themselves are liable for any injuries or damages caused by these programs, and they may choose to protect themselves against this liability by purchasing private liability insurance.

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## FTCA Regulations Prescribe Administrative and Judicial Review of Claims

The federal regulations implementing FTCA prescribe the process that federal agencies must follow in resolving claims arising from the negligent or wrongful acts of federal employees. With the extension of FTCA coverage to tribal contractors, tribal employees or volunteers under a self-determination contract are considered federal employees for the purpose of FTCA coverage. According to FTCA regulations, claims are subject first to administrative review and determination by the federal agency whose actions gave rise to the claim. Claims must include evidence and information about the actions giving rise to the injury and the injury sustained, and must be presented in writing to the responsible agency within 2 years. The claim must also request a specific amount of compensation. Once a claim has been filed, the agency has 6 months in which to review the claim before the claimant may file suit in federal court. The administrative review can result in a claim's being denied, settled, or undecided.

Claims arising from Indian Health Service programs are filed with the Department of Health and Human Services' Claims Branch in Rockville, Maryland. The Claims Branch reviews all claims for completeness and requests additional documentation as necessary. For nonmedical claims of \$10,000 or less, the Claims Branch can issue the initial administrative determination; those claims over \$10,000 are forwarded to the Office of General Counsel for a determination. A more rigorous review process exists for medical claims. Each medical claim must undergo three reviews: (1) a site review at the facility where the incident occurred; (2) an independent medical review from an off-site provider(s) in the pertinent field; and (3) a review by the Public Health Service's Quality Review Panel. The recommendations of the Quality Review Panel on the medical merits of the claim are then returned to the Claims Branch. The Claims Branch can issue the initial administrative determination for medical claims of

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\$10,000 or less, while claims over this amount are forwarded to the Office of General Counsel.

The claimant must go through the administrative claims process before filing suit in federal court. The Department of Health and Human Services can approve settlements of less than \$25,000. The Department of Justice must approve larger settlements. Settlements of \$2,500 or less are paid directly from agency funds, and larger settlements are paid from the Judgment Fund in the U.S. Treasury.<sup>4</sup> Ultimately, if the claimant is dissatisfied with the administrative determination, the claimant may file suit in federal court. The Department of Justice handles lawsuits arising from FTCA claims. FTCA claims involving tribal contractors may be turned over, or “tendered,” to private insurers when tribes have private liability insurance policies that provide coverage for the same incidents covered under FTCA.

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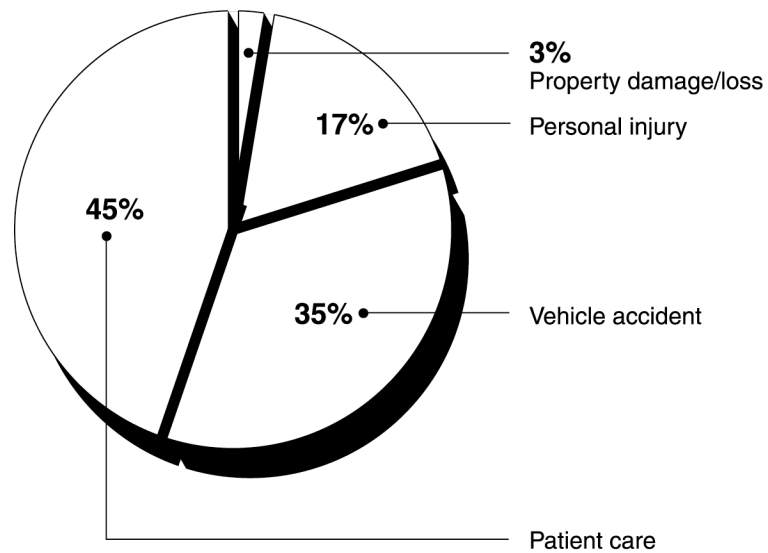
## Over One Hundred Claims Have Been Filed; Most Involve Patient Care and Vehicle Accidents

Data on FTCA claims involving tribal contractors are not readily available because the Department of Health and Human Services is not required to track these claims separately from FTCA claims involving federal employees. However, in response to our request for claims data, the department identified 114 claims filed from fiscal years 1997 through 1999 for programs contracted by tribes from the Indian Health Service. Total damages claimed were \$487 million. Patient care claims accounted for about 45 percent of all claims involving tribal contractors (51 out of 114 claims) filed during this period. Claims involving vehicle accidents constituted about 35 percent of the total, and personal injuries, about 17 percent (see fig. 1).

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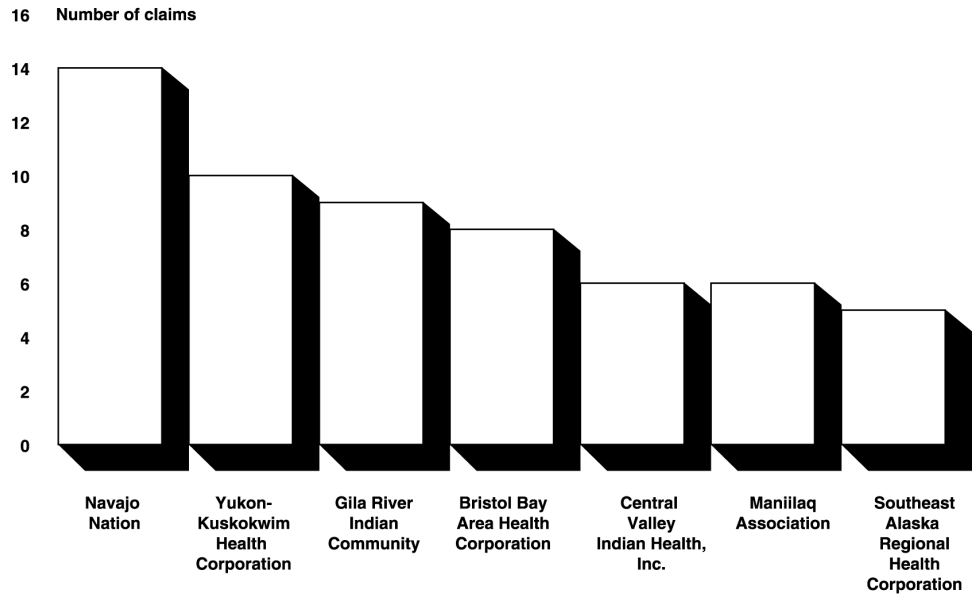
<sup>4</sup>The Judgment Fund is a permanent indefinite appropriation available to pay certain settlements and judgments against the federal government.

**Figure 1: Claims Arising from Tribally Contracted Programs From the Indian Health Service, by Type of Claim, Fiscal Years 1997-99**



These claims involved tribally contracted programs for 40 contractors. The Indian Health Service contractor with the most claims—the Navajo Nation—had 14 claims, about 12 percent of the total. Seven contractors were involved with five or more claims during the 3-year period (see fig. 2).

**Figure 2: The Seven Indian Health Service Contractors Involved With the Most Claims, Fiscal Years 1997-99**



One of the reasons why so few of the 556 tribes had claims involving their self-determination programs is because FTCA coverage is still not well-known or understood by attorneys, tribes, or potential claimants, according to the agency officials that process these claims. Also, to the extent that tribes continue to carry duplicative private liability insurance, claimants may be referred to private insurers rather than to the federal government for compensation.

The damages claimed ranged from a low of \$75 to a high of \$100 million, with a median claim amount of \$1 million. The \$75 claim involved damages to a car that was parked adjacent to a tribally contracted facility. A tribal contract employee was treating a wooden fence with water sealant when some of the overspray damaged the finish on the claimant's car. The \$75 claim to remove the spray and to wax the car was paid in full. The \$100 million claim involved an alleged misdiagnosis that resulted in delayed treatment for breast cancer. This claim was denied because the evidence failed to establish that the claimant's condition was due to an act or omission of the tribal physician.



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As of July 15, 2001, for the 114 FTCA claims filed from fiscal years 1997 through 1999 involving tribal self-determination contracts 40 resulted in settlement payments, 18 were ultimately denied and the final outcome of 56 claims is still pending either administratively or in litigation. The status of the claims filed changes frequently as new administrative determinations are made, lawsuits are filed, or settlement agreements are reached. The figures presented in this testimony have been updated since our July 2000 report. Overall, for the 40 claims that resulted in settlement payments 31 were settled administratively and 9 through litigation. Including the 18 claims that have been denied, a total of 58 claims have been brought to closure, or about 51 percent of the 114 claims. These 58 claims have been closed at a cost of about \$680,000 out of the \$230 million claimed in these cases. According to agency officials, the small, simple claims for minor incidents, such as a “fender bender,” are generally resolved quickly, while the large, complex claims may take longer to resolve. Although \$680,000 has been paid to date to resolve claims involving tribal contractors filed from fiscal years 1997 through 1999, this figure will likely increase as the remaining claims are resolved. For example, since our July 2000 report the total settlement amount has increased by about \$90,000. In aggregate, the percentage of tribal claims approved and the amount awarded are comparable with the resolution of other FTCA claims at the Department of Health and Human Services.

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Mr. Chairman, this concludes my statement. We would be pleased to respond to any questions that you or other Members of the Committee may have at this time.

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## Contacts and Acknowledgments

For information about this testimony, please contact Chet Janik or Jeff Malcolm at (202) 512-3841.